

AMENDED IN SENATE MAY 26, 2005

AMENDED IN SENATE MAY 4, 2005

SENATE BILL

No. 989

**Introduced by Committee on Environmental Quality (Senators
Lowenthal (Chair), Campbell, Chesbro, Cox, Escutia, Figueroa,
Kuehl, Runner, and Simitian)**

February 22, 2005

An act to amend Sections 25395.84 and 25395.85 of, to add Sections 25395.79.3, 25395.79.4, 25395.79.5, and 25395.81.1 to, to add Article 7 (commencing with Section 25395.102) and Article 8 (commencing with Section 25395.109) to Chapter 6.82 of Division 20 of, and to repeal Article 7 (commencing with Section 25395.105) of Chapter 6.82 of Division 20 of, the Health and Safety Code, relating to hazardous materials.

LEGISLATIVE COUNSEL'S DIGEST

SB 989, as amended, Committee on Environmental Quality. Hazardous material: bona fide ground tenant: remedial actions.

Existing law, the California Land Reuse and Revitalization Act of 2004, provides that an innocent landowner, a bona fide purchaser, or a contiguous property owner, as defined, qualifies for immunity from liability from certain state laws for pollution conditions caused by a release or threatened release of a hazardous material, if the innocent purchaser, bona fide purchaser, or contiguous property owner meets specified conditions. The act also prohibits an agency from requiring an innocent landowner, bona fide purchaser, or contiguous property owner to take a response action under certain state laws. The act defines the term "agency" as the Department of Toxic Substances Control, the State Water Resources Control Board, or a California

regional water quality control board. Existing law repeals the act on January 1, 2010.

The act requires a person who enters into an agreement with an agency for oversight of a site assessment to submit a site assessment plan to the agency and requires the agency, based upon a review of the site assessment, to determine whether a response action is necessary to address any unreasonable risk from hazardous materials at the site. If the agency determines that a response action is necessary to prevent or eliminate an unreasonable risk, the bona fide purchaser, innocent landowner, or contiguous property owner is required to submit a response plan to the agency to conduct a response action at the site.

This bill would define the term “bona fide ground tenant,” and would provide that a certified bona fide ground tenant is not subject to liability under those state laws.

The bill would require a bona fide ground tenant who seeks to qualify for immunity from liability to enter into an agreement with an agency that includes the performance of a limited site assessment; and, if the agency determines that a limited response plan is necessary, the preparation and implementation of a limited response plan. The bill would require a person who wishes to be certified as a bona fide ground tenant to request an agency to issue a certification and would require the agency to provide this certification within 60 days after implementation of the limited response plan is completed, ~~after making a specified determination~~ *if the agency makes certain determinations and the bona fide ground tenant provides specified documentation to the agency.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 25395.79.3 is added to the Health and
- 2 Safety Code, to read:
- 3 25395.79.3. (a) “Bona fide ground tenant” means a person
- 4 who meets all of the following conditions:
- 5 (1) The person enters into a ground lease at an eligible site for
- 6 a term of 25 years or more.
- 7 (2) One of the following takes responsibility for site cleanup
- 8 pursuant to applicable law, and contractually agrees with the
- 9 person and with the department or regional board, that a

1 substantial amount of the rent received from the person, or other
2 assets or income streams acceptable to the department or a
3 regional board, will serve as security for, and will be paid into an
4 Internal Revenue Code Section 468B fund, or will otherwise be
5 dedicated or set aside for, the conduct of a response plan for site
6 cleanup pursuant to applicable law:

7 (A) The person's lessor.

8 (B) A redevelopment agency under the Polanco
9 Redevelopment Act (Article 12.5 (commencing with Section
10 33459) of Chapter 4 of Part 1 of Division 24).

11 (C) A city under the California Land Environmental
12 Restoration and Reuse Act (Chapter 6.10 (commencing with
13 Section 25401)).

14 (D) Any other person acceptable to the department or a
15 regional board.

16 (3) All releases of hazardous materials at the site occurred
17 before the person acquired the ground lease for the site, except
18 for a release of hazardous materials that is of a type, nature, or
19 amount that does not require reporting to a regulatory authority
20 pursuant to applicable law or other applicable statutory or
21 regulatory reporting requirements.

22 (4) The person did not cause or contribute to a release
23 specified in paragraph (3).

24 (5) The person completes all actions directed in a limited
25 response plan approved by the department or regional board ,
26 except for ongoing site monitoring or operation and maintenance
27 activities, to make the property safe for human occupancy based
28 on its intended use.

29 (6) The person's proposed site development is either
30 consistent with a response action approved by the department or
31 regional board pursuant to Article 6 (commencing with Section
32 25395.90), Chapter 6.8 (commencing with Section 25300),
33 Article 12.5 (commencing with Section 33459) of Chapter 4 of
34 Part 1 of Division 24, or Division 7 (commencing with Section
35 13000) of the Water Code, or the tenant agrees to pay for any
36 incremental response action implementation costs that are
37 incurred primarily as a result of the tenant's site development or
38 other activities at the site.

(7) The person is not potentially liable, or affiliated with any other person who is potentially liable, for the release at issue through any of the following circumstances:

(A) A direct or indirect familial relationship.

(B) A contractual, corporate, or financial relationship, unless the contractual, corporate, or financial relationship is created by the instrument by which title or possession to the site is conveyed or financed or a contract for the sale of goods or services.

(C) The result of a reorganization of a business entity that was potentially liable for the hazardous substances at issue.

(b) For purposes of this section, “release” does not include passive migration.

SEC. 2. Section 25395.79.4 is added to the Health and Safety Code, to read:

25395.79.4. “Limited site assessment” means a site assessment conducted pursuant to Section 25395.105 that has the purpose of determining the cleanup, response, or removal action that is required to be done, if any, to make a site safe for human occupancy based on its intended use.

SEC. 3. Section 25395.79.5 is added to the Health and Safety Code, to read:

25395.79.5. “Limited response plan” means a written plan submitted to an agency pursuant to Section 25395.107 to conduct those limited removal or remedial actions required to make the site safe for human occupancy based on its intended use.

SEC. 4. Section 25395.81.1 is added to the Health and Safety Code, to read:

25395.81.1. A person is not subject to liability under any applicable law for a claim made by any person, other than an agency, for response costs or other damages associated with a release or threatened release of a hazardous material at the site characterized in the limited site assessment conducted pursuant to, or a limited response plan approved pursuant to, Article 7 (commencing with Section 25395.10), if the person is certified as a bona fide ground tenant pursuant to that article.

SEC. 5. Section 25395.84 of the Health and Safety Code is amended to read:

25395.84. (a) A court of competent jurisdiction may award reasonable attorneys’ fees and experts’ fees to a person who initiates a claim under an applicable law for contribution for, or

1 recovery of, response costs incurred for a response action, or for
2 any other response costs incurred at a site, if the person meets all
3 of the following criteria:

4 (1) The person is a bona fide purchaser, an innocent
5 landowner, a contiguous property owner, or a bona fide ground
6 tenant and qualifies for immunity pursuant to this chapter.

7 (2) The person is a prevailing party.

8 (3) On or before 20 calendar days prior to the date of the trial
9 on issues relating to the response costs at issue, the person serves
10 on the defendant both of the following:

11 (A) If a response plan has been approved for that site pursuant
12 to Article 6 (commencing with Section 25395.90) or a limited
13 response plan pursuant to Article 7 (commencing with Section
14 25395.102), as applicable, a copy of the approved response plan.

15 (B) A written demand for compensation setting forth the
16 specific sum demanded from the defendant, including a statement
17 of the reasoning supporting the demand. The amount of written
18 demand shall include all response costs sought from the
19 defendant at issue, including all interest, but shall not include
20 litigation expenses, attorneys' fees, and experts' fees. The
21 amount of the demand may include any alleged consequential
22 damages.

23 (b) In determining whether to award reasonable attorneys' fees
24 and experts' fees pursuant to this section, a court shall consider
25 the relationship of the amount of the written demand described in
26 subparagraph (B) of paragraph (3) of subdivision (a) to the total
27 sum of the response costs and, if appropriate and included in the
28 demand, the consequential damages in the written demand, to the
29 final determination of the costs and damages by the trier of fact.

30 (c) A court may award reasonable attorneys' fees and experts'
31 fees to an agency that is the prevailing party in an action arising
32 out of this chapter.

33 SEC. 6. Section 25395.85 of the Health and Safety Code is
34 amended to read:

35 25395.85. An innocent landowner, bona fide purchaser,
36 contiguous landowner, or bona fide ground tenant may seek
37 contribution from any person who is responsible for a discharge
38 or release of hazardous materials for which the innocent
39 landowner, bona fide purchaser, contiguous landowner, or bona
40 fide ground tenant incurs agency oversight costs for the review of

1 a response plan or a limited response plan or oversight of the
2 implementation of a response plan or a limited response plan
3 subject to this chapter.

4 SEC. 7. Article 7 (commencing with Section 25395.105) of
5 Chapter 6.82 of Division 20 of the Health and Safety Code is
6 repealed.

7 SEC. 8. Article 7 (commencing with Section 25395.102) is
8 added to Chapter 6.82 of Division 20 of the Health and Safety
9 Code, to read:

10
11 Article 7. Bona Fide Ground Tenant Certification
12

13 25395.102. (a) A person who wishes to be certified as a
14 bona fide ground tenant may request the agency with which it
15 entered into an agreement pursuant to Section 25395.105 to issue
16 a certification pursuant to this section. The agency shall provide
17 this certification within 60 days after implementation of the
18 limited response plan is completed, as provided in subparagraph
19 (B) of paragraph (1) of subdivision (a), ~~but only if the agency~~
20 ~~does all of the following:~~

21 ~~(a) (1) Determines that both of the following conditions have~~
22 ~~been met: (b), but only if the agency makes the determinations~~
23 ~~specified in subdivision (b) and the bona fide ground tenant~~
24 ~~provides the documentation specified in subdivision (c).~~

25 (b) (1) The agency shall make both of the following
26 determinations before issuing a certification pursuant to this
27 section:

28 (A) The limited response plan is implemented at an eligible
29 site.

30 (B) The limited response plan has been completed under the
31 direction of the agency, except for ongoing site monitoring or
32 operation and maintenance activities.

33 (2) The agency shall issue the determination as specified in
34 paragraph (1) in the following manner:

35 (A) Within 60 days after the date the agency approves a
36 workplan for a limited response plan the agency acknowledges,
37 in writing, that upon proper completion of the limited response
38 plan, the person will be eligible for certification as a bona fide
39 ground tenant.

1 (B) Within 30 days after the date when implementation of the
2 limited response plan is commenced, the person notifies the
3 department, the local health and building departments, and the
4 regional board.

5 (C) Within 60 days after the date the implementation of the
6 limited response plan is completed, the agency acknowledges in
7 writing that the person is a certified bona fide ground tenant for
8 purposes of this chapter.

9 ~~(b) The agency certifies all of the following:~~

10 *(c) The bona fide ground tenant shall provide to the agency*
11 *information that documents all of the following:*

12 (1) The bona fide ground tenant is a party to a lease agreement
13 with the owner or sublessor of the property.

14 ~~(2) The bona fide ground tenant is obligated under the lease or~~
15 ~~sublease to make monthly lease payments that would constitute a~~
16 ~~reasonable fair market rental value for the property if the~~
17 ~~property was in a clean condition, discounted only for the~~
18 ~~expected costs of completing a limited site assessment,~~
19 ~~implementing a limited response plan, and any institutional~~
20 ~~controls or other requirements imposed by this chapter, or~~
21 ~~otherwise.~~

22 ~~(3)~~

23 *(2) The terms of the lease agreement are commercially*
24 *reasonable under the circumstances existing at the property and*
25 *are not collusive in nature or effect.*

26 *(3) All nonrent payments to the owner have been, and will*
27 *continue to be, disclosed to the agency.*

28 (4) The site is in compliance with the requirements of Section
29 101(40)(D), (E), (F), (G), and (H), inclusive, of the federal act
30 (42 U.S.C. Sec. 9601(40)(D) to 9601(40)(H), inclusive).

31 ~~(4) The person requesting the certification under this section~~

32 *(5) The bona fide ground tenant has implemented, and is*
33 *continuing to implement, the limited response plan in*
34 *conjunction with, and consistent with, any, redevelopment or*
35 *revitalization of the area in which the site is located.*

36 25395.103. An agency may withdraw a certification issued
37 pursuant to Section 25395.102 only if the agency that originally
38 issued that certification provides reasonable notice and
39 opportunity for the holder of the certification to take action to
40 prevent the withdrawal, and makes one the following findings:

1 (a) Material violations continue to exist for one or more of the
2 conditions, restrictions, or limitations imposed on the site as part
3 of the limited response action or certification.

4 (b) Site monitoring or operation and maintenance activities
5 that are required for the site as part of the limited response action
6 are not adequately funded or are not properly carried out.

7 (c) The person induced the agency to approve the completion
8 of the limited response action or issue the certification by fraud
9 or intentional nondisclosure or misrepresentation.

10 25395.104. A bona fide ground tenant that is certified
11 pursuant to this article may transfer the certification to a
12 subsequent bona fide ground tenant and that subsequent tenant
13 shall be subject to the rights and duties conferred by this article
14 upon a certified bona fide ground tenant.

15 25395.105. (a) A person that is a bona fide ground tenant
16 who seeks to qualify for the immunity provided by this chapter
17 shall enter into an agreement with an agency pursuant to this
18 section that includes the performance of a limited site
19 assessment, and, if the agency determines that a limited response
20 plan is necessary, the preparation and implementation of a
21 limited response plan.

22 (b) Before finalizing the agreement, the requested agency shall
23 notify other appropriate agencies, including the host jurisdiction.

24 (c) A person who enters into an agreement with an agency
25 pursuant to this section shall submit sufficient information to the
26 agency for the agency to determine whether the site is an eligible
27 site and whether the person meets the conditions to qualify as a
28 bona fide ground tenant pursuant to this chapter and prepare an
29 agreement pursuant to this section.

30 (d) (1) A person who enters into an agreement pursuant to this
31 section shall agree to take all actions necessary to make the site
32 safe for human occupancy based on its intended use. These
33 actions may include actions necessary to prevent an imminent
34 and substantial endangerment before the approval of a limited
35 response plan.

36 (2) In determining whether the limited response plan will
37 make the site safe for its intended use for purposes of this
38 subdivision, the agency shall take into account the intended use
39 of the property, in accordance with any changed use of the
40 property.

1 25395.106. (a) (1) A person who enters into an agreement
2 with an agency pursuant to Section 25395.105 for the oversight
3 of a limited site assessment shall submit a limited site assessment
4 plan to the agency to conduct a limited site assessment of the site
5 in accordance with the requirements of this section.

6 (2) If the agency requires a health risk assessment as part of
7 that agreement, the health risk assessment shall be prepared in
8 accordance with subdivisions (b), (c), and (d) of Section
9 25356.1.5.

10 (b) The limited site assessment plan shall include all the
11 following:

12 (1) Adequate characterization of the hazardous materials at the
13 site for the purposes of ensuring that the site is safe for any
14 intended development or use.

15 (2) Reasonably available information about the site, including
16 where appropriate, a risk assessment that evaluates the risk posed
17 by any hazardous materials released or threatened to be released
18 at, or from, the site, and information regarding reasonably
19 anticipated foreseeable uses of the site based on current and
20 projected land use and zoning designations.

21 (c) A person shall submit the limited site assessment plan to
22 the agency for review and approval.

23 (d) The agency shall evaluate the adequacy of the limited site
24 assessment plan to ensure it contains all necessary information.

25 (e) After evaluating the limited site assessment plan, if the
26 agency finds that the limited site assessment is adequate to
27 address the intended uses or development of the site the agency
28 shall approve the limited site assessment and provide notification
29 to appropriate persons.

30 25395.107. (a) After implementing the limited site
31 assessment plan, the person shall submit a report of the findings
32 made pursuant to the plan to the agency. Based upon a review of
33 this information, the agency shall determine whether a limited
34 response plan is required to be developed to ensure that the site is
35 safe for human occupancy based on its intended use.

36 (b) If upon review of the limited site assessment prepared
37 pursuant to this article, the agency determines that a limited
38 response plan is necessary to ensure that the site is safe for its
39 intended use, the bona fide ground tenant shall submit a limited
40 response plan to the agency to conduct a limited response action

1 at the site, in conformance with the agreement entered into
2 pursuant to Section 25395.105. The agency shall not require the
3 limited response plan to address the remediation of deep soil or
4 groundwater contamination, unless the agency determines this
5 remediation is necessary to make the site safe for the intended
6 human use. The limited response plan shall include all of the
7 following:

8 (1) An opportunity for the public, other agencies, and the host
9 jurisdiction to participate in decisions regarding the limited
10 response plan, taking into consideration the nature of the
11 community interest.

12 (A) The methods for public participation proposed in the
13 response plan shall include a public notice and opportunity for
14 public review and comment, and may include, but are not limited
15 to, the use of factsheets, public notices, direct notification of
16 interested parties, public meetings, and an opportunity to
17 comment on the proposed response plan prior to agency
18 approval.

19 (B) To the extent possible, the agency shall coordinate its
20 public participation activities with those undertaken by the host
21 jurisdiction and other agencies associated with the development
22 of the property, to avoid duplication to the extent feasible.

23 (2) Identification of the release or threatened release that is the
24 subject of the limited response plan and documentation that the
25 limited response plan is based on an adequate characterization of
26 the site.

27 (3) An identification of the limited response plan objectives
28 and the proposed remedy, and an identification of the reasonably
29 anticipated future land uses of the site and of the current and
30 projected land use and zoning designations. This identification
31 shall include confirmation by the host jurisdiction that the
32 anticipated future land uses and current and projected land uses
33 and zoning designations are accurate.

34 (4) A description of activities that will be implemented to
35 control all endangerment that may occur during the limited
36 response action at the site.

37 (5) A description of all land use controls that are part of the
38 response action.

1 (6) A description of wastes other than hazardous materials at
2 the site and how that waste will be managed in conjunction with
3 the response action.

4 (7) Provisions for the removal of containment or storage
5 vessels and other sources of contamination, including soils and
6 free product, that cause an imminent or substantial
7 endangerment.

8 (8) Provisions for the agency to require further response
9 actions based on the discovery of hazardous materials that pose
10 an unreasonable risk to human health and safety or the
11 environment that are discovered during the course of the limited
12 response action or subsequent development of the site.

13 (9) Any other information that the agency reasonably
14 determines is necessary.

15 (c) The agency shall evaluate the adequacy of the limited
16 response plan submitted pursuant to subdivision (b) and shall
17 approve the plan if the agency makes all of the following
18 findings:

19 (1) The plan contains the information required by subdivision
20 (b).

21 (2) When implemented, the plan will place the site in a
22 condition that allows it to be used for its reasonably anticipated
23 future land use without substantial risk to the human health and
24 safety of the anticipated occupants of the site.

25 (3) The plan addresses all public comments.

26 (4) If applicable, the plan provides for land use or engineering
27 controls, or other ongoing site monitoring or operation and
28 maintenance activities, that are part of the remedy contained in
29 the limited response plan, and requires the bona fide ground
30 tenant to submit periodic reports to the agency to demonstrate
31 continued compliance with the requirements of this paragraph.

32 (d) Upon approval of the limited response plan by the agency,
33 the agency shall notify all appropriate persons, including the host
34 jurisdiction.

35 (e) If the use of the property changes, after a limited response
36 plan is approved, to a use that requires a higher level of
37 protection, the agency may require the preparation and
38 implementation of a new limited response plan pursuant to this
39 article.

1 25395.108. (a) A person, who acquires a property from a
2 bona fide ground tenant that was previously issued a certificate
3 of completion for a limited response plan required by this article,
4 may qualify as a bona fide ground tenant by demonstrating to the
5 agency that the person meets the bona fide ground tenant
6 eligibility requirements of this chapter.

7 (b) *A person may withdraw from an agreement entered into*
8 *pursuant to this article by providing a 30-day written notice to*
9 *the agency and doing both of the following:*

10 (1) *Reimbursing the agency for all costs incurred by the*
11 *agency pursuant to the agreement.*

12 (2) *Demonstrating to the satisfaction of the agency, that*
13 *conditions at the site to which the agreement applies do not pose*
14 *an endangerment to public health and safety or the environment.*
15 *If the agency determines that conditions at the site pose an*
16 *endangerment to public health, safety, or the environment, this*
17 *article does not prevent the agency from exercising its authority*
18 *to take appropriate response actions or to cause the person*
19 *responsible for the endangerment to take appropriate response*
20 *actions.*

21 (c) *A person who enters into an agreement with an agency*
22 *pursuant to this article shall reimburse the agency for all agency*
23 *costs, including, but not limited to, costs incurred while*
24 *reviewing a limited site assessment plan or a limited response*
25 *plan or overseeing the implementation of a site assessment or*
26 *response plan by the person pursuant to this article, except that*
27 *the department's costs shall be reimbursed pursuant to Chapter*
28 *6.66 (commencing with Section 25269) and shall be recoverable*
29 *pursuant to Section 25360.*

30 (d) *The entry into an agreement pursuant to this article shall*
31 *not constitute an admission of fact or liability or conclusion of*
32 *law for any purpose or proceeding and no person who enters into*
33 *an agreement under this article shall be deemed liable under any*
34 *other provision of law solely by reason of entering into that*
35 *agreement.*

36 SEC. 9. Article 8 (commencing with Section 25395.109) is
37 added to Chapter 6.82 of Division 20 of the Health and Safety
38 Code, to read:

Article 8. Repeal

1
2
3 25395.109. This chapter shall remain in effect only until
4 January 1, 2010, and as of that date is repealed, unless a later
5 enacted statute, that is enacted before January 1, 2010, deletes or
6 extends that date.

O